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APPENDIX A

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

[Filed Jan. 8, 2003]

Case No. 2:02-CV-524TC

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., JB.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,

Defendants.

ORDER

For the reasons set forth at the close of the January 7, 2003 hearing, Star Buffet, Inc.'s motion to dismiss is GRANTED. The case is dismissed as to Star Buffet, Inc.

IT IS SO ORDERED.

DATED this 7th day of January, 2003.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:02CV0524C
Judge Tena Campbell

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC. and STAR BUFFET, INC.,

Defendants.

STIPULATION FOR DISMISSAL WITH PREJUDICE OF DEFENDANT THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK

This matter is currently on appeal before the Tenth Circuit Court of Appeals. On August 29, 2003, the Tenth Circuit entered an Order abating the appeal because not all defendants had been dismissed with prejudice. This stipulation is to address that Order.

On January 9, 2003, this Court granted a Motion to Dismiss filed by Star Buffet, one of the defendants. While not made on behalf of any other defendant, it is evident that the grounds for dismissal are equally applicable to the remaining defendants in the case. Rather than require the time and expense of briefing that issue again and taking this Court's time and resources to verify this fact, the Plaintiff and defendant

The United States Life Insurance Company in the City of New York ("U.S. Life") stipulate that the Plaintiff's claims against U.S. Life may be dismissed with prejudice in this case. The parties also agree that in the event the Tenth Circuit reverses this Court's ruling as to Star Buffet, the Plaintiff will not be precluded from including U.S. Life as a defendant in that remanded action.

In addition, the Plaintiff requests that, for purposes of complying with the August 29, 2003, Tenth Circuit Order, Defendants J.B.'s Restaurants, Inc. and J.B.'s Family Restaurants, Inc. be dismissed with prejudice.

DATED this 9th day of September, 2003.

/s/ Brian S. King Esq.
BRIAN S. KING, ESQ.
Attorney for Plaintiff

DATED this 9th day of September, 2003.

SNELL & WILMER

/s/ Mark O. Morris
MARK O. MORRIS
Attorneys for Defendant
The United States Life Insurance
Company in the City of New York

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:02CV0524C
Judge Tena Campbell

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC. and STAR BUFFET, INC.,

Defendants.

ORDER OF DISMISSAL WITH PREJUDICE OF DEFENDANT THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK AND THE J.B.'S RESTAURANTS DEFENDANTS

Based on the Stipulation previously entered between the Plaintiff and counsel for The United States Life Insurance Company in the City of New York and the Plaintiff's notice of her desire to dismiss with prejudice claims against J.B.'s Restaurants, Inc. and J.B.'s Family Restaurants, Inc., and good cause appearing, the Court hereby ORDERS that the Plaintiff's claims against U.S. Life and the J.B.'s Restaurants Defendants are dismissed with prejudice.

DATED this __ day of September, 2003.

Honorable Judge Tena Campbell

Approved as to form:

/s/ Mark O. Morris
MARK O. MORRIS
Attorney for U.S. Life

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Dec. 10, 2004]

No. 03-4097

SANDY CALLERY,
Plaintiff-Appellant,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK; JB'S RESTAURANTS, INC.; JB'S FAMILY RESTAURANTS; STAR BUFFET,
Defendants-Appellees.

AARP; SECRETARY OF LABOR,
Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 02-CV-524-C)

Before KELLY, HOLLOWAY, and LUCERO, *Circuit Judges.*

KELLY, *Circuit Judge.*

Plaintiff-Appellant Sandy Callery appeals from a judgment on the pleadings in favor of Defendant-Appellee Star Buffet. The district court held that the monetary award sought by Ms. Callery did not constitute "appropriate equitable relief" under § 502(a)(3) of ERISA. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Background

In 1994, Plaintiff-Appellant Sandy Callery filled out an application for life insurance with The United States Life Insurance Company in the City of New York. ("U.S. Life"). The group insurance was sponsored by her employer. In addition to her own coverage and coverage for children, she selected "Life insurance for spouse" in the amount of $100,000. On August 29, 1997, Mr. and Mrs. Callery divorced, but she continued to pay life insurance premiums for Mr. Callery's coverage until his death on February 28, 2000. Ms. Callery applied for the benefits, and U.S. Life denied coverage based upon a policy exclusion providing for termination of a spouse's eligibility for life insurance upon divorce. U.S. Life provided her a copy of the policy, and refunded the premiums she had paid.

Ms. Callery filed suit against U.S. Life and her employers, J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet, Inc., claiming that Defendants violated ERISA's notice requirements, 29 U.S.C. § 1021, and breached their fiduciary duties, *Id.* § 1104(a)(1), by failing to provide her copy of the summary plan description ("SPD"). Aplt. App. 8-9. Her complaint sought a judgment in her favor of $100,000, plus prejudgment interest, and attorney's fees and costs, though one claim referred to this relief as "equitable relief." *Id.* at 9. As the litigation progressed, it became clear that Ms. Callery sought a remedy under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), contending that "appropriate equitable relief" would include the face value of the life insurance policy.

Following dismissal of all other defendants without prejudice, Star Buffet moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), arguing "appropriate equitable relief" under § 502(a)(3) does not include the payment of $100,000, which would be the equivalent of the life insurance proceeds. In an oral ruling followed by a summary

order, the district court granted the motion. Ms. Callery now appeals.

Discussion

We review the district court's grant of judgment on the pleadings pursuant to Rule 12(c) under the same standard of review applicable to a Rule 12(b)(6) motion. *Ramirez v. Dep't of Corr.*, 222 F.3d 1238, 1240 (10th Cir. 2000). Thus review is de novo, applying the same standard as the district court. *Id.* All well-pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Id.* A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Section 502 authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). The only issue is whether ERISA's limitation of remedies to "appropriate equitable relief" allows monetary relief in these circumstances.

A. Appropriate Equitable Relief

The Supreme Court has addressed the meaning of "appropriate equitable relief" under § 502(a)(3) in several opinions, including *Great-West Life &, Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 209-21 (2002), and *Mertens v. Hewitt Associates*, 508 U.S. 248, 251-63 (1993). In both cases, the Court unequivocally rejected attempts to impose personal liability for a contractual obligation to pay money under § 502(a)(3), holding that the term "equitable relief" in § 502(a)(3) refers to "those categories of relief that were typically available in equity (such as injunction, mandamus,

and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256; *see also Great-West*, 534 U.S. at 210.

In *Mertens*, a class of former steel industry employees participating in a qualified pension plan brought suit against a non-fiduciary, seeking monetary relief under § 502(a)(3). *Mertens*, 508 U.S. at 250. The Court concluded that although the employees "often dance around the word, what [they] in fact seek is nothing other than compensatory damages" in the form of monetary relief for damages resulting from the alleged breach of fiduciary duty. *Id.* at 255. "Money damages are, of course, the classic form of legal relief." *Id.*

In *Great-West*, the Court further elaborated on the meaning of "appropriate equitable relief." In that case, Great-West provided coverage to the defendant-beneficiary, who was severely injured in a car accident, pursuant to a plan that included a reimbursement provision. *Great-West*, 534 U.S. at 207. Great-West sought to recover monies paid by a third party to the beneficiary under the reimbursement provision through § 502(a)(3). *Id.* at 208. The Court rejected its claim, holding that Great-West was merely seeking, "in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity." *Id.* at 210. Reaffirming its previous holding in *Mertens*, the Court stated that "we rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority)." *Id.* (citing *Mertens*, 508 U.S. at 257-58). The Court specifically rejected the argument that the monetary payment sought was equitable relief, stating that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Id.* at 210-11.

The Tenth Circuit has followed this reasoning, concluding that generally "monetary compensation for economic or other harm" is unavailable under ERISA. *Moffett v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1234 (10th Cir. 2002); *see also Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1251-54 (10th Cir. 2004) (concluding that back pay was appropriately classified as legal relief).

In her complaint, Ms. Callery seeks "payment of insurance on the life of John Callery in the amount of $100,000" and "equitable relief providing for payment of the insurance on the life of John Callery." Aplt. App. 8-9. In her opposition to the Rule 12(c) motion, she is more specific. She asks the court "to enjoin the defendants from not paying her the life insurance benefits." Aplt. App. 69. In the alternative, she seeks "an order estopping Defendant's from denying" the claim. *Id.* at 70. She also claims that equitable remedies such as constructive trust or equitable lien might be appropriate, as well as restitution or specific performance. *Id.* at 70, 74.

Ms. Callery necessarily avoids the term "compensatory damages." As the Court explained, "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. And [m]oney damages are, of course, the classic form of legal relief." *Great-West*; 534 U.S. at 210 (internal citations and quotations omitted) (emphasis in original).

To the extent Ms. Callery seeks payment of the policy proceeds, such relief is barred under § 502(a)(3). To the extent she seeks injunctive relief compelling the payment of the policy proceeds, Ms. Callery has dismissed the insurance company from the case and has not alleged that her situation satisfies the limitations placed upon the grant of injunctive relief in equity. *Great-West*, 534 U.S. at 211 n.l. Ms. Callery's

claim might be most accurately construed as one for reliance damages, because she claims that the lack of notice prevented her from obtaining life insurance on her former husband from another source. Included in the record is Ms. Callery's affidavit suggesting an insurable interest—her former husband provided child support for their children. Aplee. App. 20-21. Regardless, such relief is compensatory and not typically available in equity. Dan B. Dobbs, *Law of Remedies* § 12.3(1), at 50; *see also Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 583 (6th Cir. 2002).

In the alternative, Ms. Callery argues that following *Mertens* and *Great-West*, numerous courts continue to allow monetary relief under § 502(a)(3). She relies upon *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Varco*, 338 F.3d 680, 687-88 (7th Cir. 2003) and *In re Carpenter*, No. 00-2348, 2002 WL 1162277, at *1-2 (4th Cir. June 3, 2002). These cases merely reflect that awards of equitable restitution damages are still permitted under the Supreme Court's decisions. In *Great-West*, the Court stated that restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, was typically available in equity and therefore is an appropriate equitable remedy. 534 U.S. at 213. Such restitution is limited to situations where the money or property can be "traced to particular funds or property in the defendant's possession." *Id.*

Ms. Callery, however, is not seeking to regain particular funds or property. She argues that the full amount of the insurance policy is the appropriate award of restitution damages under equitable principles. However, restitution recoveries are based upon a defendant's gain, not on a plaintiff loss. *Great-West*, 534 U.S. at 229 (Ginsburg, J., dissenting). Using this approach, restitution damages might equal the premiums paid by Ms. Callery to Star Buffet (ignoring that these amounts were probably forwarded to U.S. Life), rather than

the face amount of the policy (the loss to Ms. Callery). These cases simply do not support full compensatory damages, as she requests. In fact, Ms. Callery has already been refunded the premium payments made after her divorce; she has thus already received restitution damages.

Next, Ms. Callery argues that the Supreme Court's decision in *Varity Corp., v. Howe*, 516 U.S. 489 (1996), supports her claim. In *Varity*, the issue before the Court was whether individual beneficiaries harmed by an administrator's breach of fiduciary obligations may bring suit. 516 U.S. at 492. Importantly, the issue of whether the relief sought, namely reinstatement, was equitable was conceded and not before the Court. *Id.* at 508. Nevertheless, Ms. Callery argues that the real benefit conveyed was not reimbursement, but rather the monetary benefit associated with reinstatement to a solvent plan. However, Ms. Callery never sought relief in the form of reinstatement. In any event, even if the insurance company was still a party and we were to "reinstate" Ms. Callery to the policy, this, like specific performance of the contract, would entitle her to exercise the contract. The terms of the contract, of course, do not entitle her to payment, because they exclude coverage of former spouses. Accordingly, Ms. Callery's claim for full payment of the face value of the policy is not analogous to *Varity*, in which the plaintiffs sought reinstatement in the plan in question.

Ms. Callery's second argument involving *Varity* is based on the Court's statement that § 502 of ERISA is a "'catchall' provision[that] act[s] as a safety net, offering appropriate equitable relief for injuries . . . not elsewhere adequately remed[ied]." *Id.* at 512. Relying on *Varity*, she argues that "there is no reason to believe Congress would want to immunize breaches of ERISA's statutory requirements that result in great harm to beneficiaries by denying those beneficiaries any remedy." Aplt. Br. at 28.

An identical argument was rejected by the Supreme Court in *Mertens*, where the Court stated that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration," especially considering the complex and detailed structure of ERISA. 508 U.S. at 261-62; *see also Great-West*, 534 U.S. at 220-21 (rejecting the same argument); *Millsap*, 368 F.3d at 1259 (rejecting the same argument).

Ms. Callery also argues that if she "has no remedy for the undisputed violations of ERISA, the Defendants may ignore ERISA's requirements with impunity." Aplt. Br. at 28. But Ms. Callery *has* a remedy under ERISA; under § 502(a)(3) she is entitled to "appropriate equitable relief." Though the equitable relief she might obtain (i.e. plan compliance with notice requirements in the future or premium returns) would not be as attractive as compensatory damages, the limitation of remedy is the product of the statute and we must enforce it.

Next, Ms. Callery argues that the Tenth Circuit has provided equitable remedies under § 502(a)(3) in order to allow monetary relief in past cases, citing *Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991). In *Downie*, the court used its equitable powers to restore the parties to their original positions in order to affect the beneficiary's ability to receive future payments. *Id.* at 1170-71. This is a clear equitable remedy and is distinct from the relief sought in this case.[1]

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[1] Within this argument, Ms. Callery also cites numerous other cases, which do not address the issue of appropriate equitable relief under § 502 (a)(3) and are therefore inapposite. *See Horn v. Cendant Operations, Inc.*, No. 01-5205, 2003 WL 21513210, at *7 (10th Cir. July 3, 2003); *Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co.*, 130 F.3d 950 (10th Cir. 1997); *Bartlett v. Martin Marietta Operations Support Inc. Life Ins. Plan*, 38 F.3d 514 (10th Cir. 1994).

Ms. Callery also asserts that her claim is distinguishable because this case involves an aleatory contract—one that was dependent upon some fortuitous event that was beyond the control of the parties involved. Restatement (Second) of Contracts § 232 cmt. c (1981). Ms. Callery asserts that with regard to aleatory contracts, the Restatement supports allowing the beneficiary to reach the profits or unjust enrichment realized by the breaching party. The Restatement merely recognizes the rule that a beneficiary may reach any profits resulting from wrongful disposition of trust property by the trustee, even if the transaction was one that involved a great risk of loss or possibility of profit. Restatement (Second) of Trusts § 202 cmt. c. Ms. Callery is not attempting to reach profits realized by Star Buffet through improper use of her premiums, and thus this section of the Restatement does not support her case.

Ms. Callery's final argument is that other equitable relief traditionally available at common law would be appropriate in this case, including equitable estoppel, accounting for profits, and reformation. Although other circuits have recognized equitable estoppel in limited circumstances in the context of ERISA, the Tenth Circuit has not done so. *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992); *see also Kaus v. Standard Life Ins. Co.*, 176 F. Supp. 2d 1193, 1198-99 (D. Kan. 2001).[2] *Miller* left open the possibility that estoppel might be applied in "egregious" cases, 978 F.2d at 625, but Ms. Callery has not alleged such circumstances (lies, fraud or an intent to deceive) in this case. With regard to Ms. Callery's claims for accounting for profits and reformation, Ms. Callery did not assert these arguments before the district court. New arguments presented for the first time on appeal are not prop-

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[2] Ms. Callery cites *Johnson v. Life Investors Insurance Co. of America*, 996 F. Supp. 1105 (D. Utah 1998) for the proposition that the Tenth Circuit recognizes equitable estoppel. However, that case dealt with the Utah Insurance Regulations, not ERISA. *Id.* at 1107.

erly before the court and, absent extraordinary circumstances, will not be considered. *McDonald v. Kinder-Morgan. Inc.*, 287 F.3d 992, 999 (10th Cir. 2002).

B. *Suit Against a Fiduciary for Breach of Fiduciary Duty*

Ms. Callery, and amici Secretary of Labor and AARP, assert that the limited availability of monetary damages in *Mertens* and *Great-West* is inapplicable in this case because those cases involved contract breaches by non-fiduciaries, rather than a claim against a fiduciary for a breach of fiduciary duty. Ms. Callery asserts that the monetary relief she seeks was typically available in equity for a breach of fiduciary duty. *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) ("Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty."). In a breach of trust action against a trustee, monetary relief may be awarded based on any losses to the trust or gains by the trustee as a result of the breach. *See* Restatement (Second) of Trusts § 205. Thus, Ms. Callery and amici assert that "the remedies of the beneficiary against the trustee are exclusively equitable." Restatement (Second) of Trusts § 197. This issue has never been squarely addressed by the Tenth Circuit.

Ms. Callery argues that decisions in other circuits support her conclusion. In *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000), the court found that Wal-Mart breached its fiduciary duty by failing to adequately explain plan coverage and limitations. The Seventh Circuit awarded the "equitable remedy of restitution," in the form of reinstatement in the plan, *id.*, totally dissimilar to the relief sought here. In *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 143 (2d Cir. 1999), decided prior to *Great-West*, the plaintiff sought the amount of money she would have received had the alleged breach of fiduciary duty not resulted in the insurance becoming ineffective by the time of her husband's death. The court noted that such claims "have lain at the heart of equita-

ble jurisdiction from time immemorial." *Id.* at 144. Thus, the court allowed "make-whole" damages under § 502(a)(3), concluding that the remedy was typically available in equity because "plaintiff's claim is based on the alleged breach of a fiduciary duty, a claim that has always been within the exclusive jurisdiction of equity. *Id.* at 145.

As noted above, the Supreme Court has rejected this broad definition of "equitable remedy" as any remedy that a court of equity could grant in favor of those categories of relief that were *typically* available in equity. *Great-West*, 534 U.S. at 219 (rejecting the argument that "the common law of trusts provides petitioners with equitable remedies that allow them to bring this action under § 502(a)(3)").

Importantly, the cases relied upon by Ms. Callery were decided before *Great-West*, and courts have since questioned their continuing validity in light of that decision. *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 110 n.8 (1st Cir. 2002) (stating that it is unclear whether *Bowerman's* reasoning that reinstatement is equitable is still valid); *Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 445 (S.D.N.Y. 2002) (stating that "the Second Circuit's reasoning in *Strom* has been superseded by *Great-West Life*"). While the arguments of amici that we should look to the common law of trusts and award monetary damages pursuant to an equitable breach of trust by a fiduciary may have been compelling before *Great-West*, they are not so now.

Further, other courts have rejected the distinction made in *Strom* and *Bowerman* based on the status of the defendant as a fiduciary. For example, in *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996), the beneficiary asserted that *Mertens* did not control because it dealt with the availability of monetary relief against a nonfiduciary. The court stated, "the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropriate equitable relief' under § 502(a)(3)." *Id.*

at 378. The court concluded that monetary damages equal to the benefits the beneficiary would have received but for the fiduciary's breach constituted legal relief unavailable under § 502(a)(3). *Id.*

Similarly, in *Rego v. Westvaco Corp.*, 319 F.3d 140, 144-46 (4th Cir. 2003), Rego requested an order of specific performance requiring defendants to issue him stock in compensation for their breach of fiduciary duty. After the district court determined the claim was not equitable, he argued, on appeal, that at common law, actions for breach of fiduciary duty could only be brought in equity. *Id.* at 145. After considering *Mertens* and *Great-West* and finding that the Supreme Court had "squarely rejected" the argument, the court stated that "the relevant question is not whether a given type of case would have been brought in a court of equity, but whether a given type of relief was available in equity courts as a general rule." *Id.* Ultimately, the court refused to award monetary damages as equitable relief under § 502(a)(3). *Id.*; *see also Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper Inc.*, 382 F.3d 587, 596 (6th Cir. 2004) (rejecting plaintiff's argument that money damages should be awarded because the suit is by a beneficiary against a fiduciary, as "explicitly rejected" in *Great-West*); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477; 482-83 (6th Cir. 2001) ("ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries."); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 945 (8th Cir. 1999) (determining that a claim for monetary relief for losses as a result of breach of fiduciary duty was a claim for compensatory damages not constituting equitable relief); *Rogers v. Hartford Life & Accident Ins. Co.*; 167 F.3d 933, 944 (5th Cir. 1999) (noting "the Supreme Court firmly closed this door" on the recovery of compensatory damages under § 502(a)(3)); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (stating that "the status of the defendant (i.e., fiduciary or nonfi

duciary) does not affect the question of whether compensatory legal damages constitute "appropriate equitable relief").

Though the issue is close, we must adhere to the Supreme Court's rather emphatic guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as "appropriate equitable relief" under § 502(a)(3) of ERISA.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-4097

SANDY CALLERY,
Plaintiff/Appellant,

v.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,
Defendants/Appellees.

PETITION FOR REHEARING AND
FOR *EN BANC* CONSIDERATION

Appeal from Federal District Court for the
Central District of Utah

Judge Tena Campbell

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING PETITION FOR REHEARING AND FOR *EN BANC* CONSIDERATION

A panel of the Tenth Circuit Court of Appeals issued its opinion in this case on December 10, 2004. A copy of the decision is attached as Exhibit A, as required by Rules 35.2(B) and 40.2 of the Tenth Circuit Rules.

Pursuant to F.R.A.P. 35 and 40, Plaintiff-Appellant Sandy Callery ("Callery") respectfully requests that this matter be reheard on the grounds that the panel decision is inconsistent with decisions from the United States Supreme Court and with a prior ruling of this Circuit. In addition, the case deals with a question of exceptional public importance: the scope of remedies available to ERISA participants and beneficiaries who are injured by breaches of ERISA's fiduciary duty requirements. Finally, the decision misapprehends an important point of law and fact in the trial record.

The decision contradicts the instructions of the Supreme Court that "appropriate equitable relief" under ERISA §502(a)(3) is determined by referring to relief that was ". . . typically available in equity. . . . " *Great-West Life and Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). Great-West makes clear what analytical process should be followed in evaluating what type of relief would be typically available in equity. Courts should be ". . . consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin and the Restatements, which make the answer clear." *Great-West*, 534 U.S. at 217. The decision fails to evaluate the standard current works *Great-West* directs the Court to consider. Those standard current works unequivocally state that when dealing with claims of injured trust beneficiaries against breaching fiduciaries, monetary relief is an appropriate equitable remedy. The decision issued in this case fails to acknowledge the continuing vitality of this body of equitable law. This is a significant error in the decision's analysis that contradicts Supreme Court language.

This error is especially problematic because this Circuit earlier followed *Great-West's* instruction in *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1252-57 (10th Cir. 2004). In *Millsap*, the primary basis for the Court's decision was a careful evaluation of standard current works to determine whether an award of back pay for a violation of §510 of ERISA was typically available in equity. Such an analysis is completely missing in the decision in this case.

In addition, this case deals with an issue of exceptional public importance. ERISA governs the rights to employee benefits of millions of people in the Tenth Circuit. Preventing and redressing harm done to these individuals by the wrongful acts of ERISA fiduciaries is precisely what ERISA was designed to address. The decision in this case leaves participants and beneficiaries without a meaningful remedy for the damage done by breaches of fiduciary duty.

Finally, the decision errs in stating that Callery's Complaint and arguments to the trial court requested something less than the full scope of relief typically available in equity. The decision states that Callery did not assert equitable claims for reinstatement, Slip Op. at p. 10, or for accounting for profits or reformation, Slip Op. at p. 13. In fact, in her Complaint, her written arguments on Star Buffet's Motion to Dismiss and in oral argument, Callery repeatedly requested the full scope of equitable relief available. *See*, Complaint, ¶¶ 19, 24, and prayer for relief, ¶ 3, Callery Appendix at pp. 8-10; Callery Memorandum in Opposition to Star Buffet Inc.'s Motion for Judgment on the Pleadings, pp. 4 and 9, Callery Appendix, pp. 70 and 75. She also indicated her need for discovery to determine what particular equitable relief was available to her. Callery Appendix at 70 and 75. Callery argued to the trial court that full consideration of many different equitable remedies depended on how the facts developed in the discovery process. However, the trial court dismissed the case before any discovery could be done. The

record before the trial court does not support the decision's statement that Callery waived any rights that might typically be available at equity. It is also improper to deprive Callery of any ability to uncover facts that could support application of equitable remedies that may not be evident at this time.

ARGUMENT

I THE DECISION ERRS IN HOLDING THAT MONETARY RELIEF IS NEVER AVAILABLE TO AN INJURED ERISA BENEFICIARY RESULTING FROM A FIDUCIARY'S BREACH OF ITS DUTIES

The decision, Slip Op. pp. 13-17, adopts Star Buffet's argument that *Great-West* has the effect of precluding any monetary relief to ERISA participants or beneficiaries resulting from a fiduciary's breach of its obligations. This is incorrect for many reasons. Most importantly, it ignores the language in *Great-West* that specifically holds that determining the scope of relief typically available at equity will require nothing more than simply relying on standard current works that describe the scope of that relief. *Great-West* gives examples of those standard current works ("Dobbs, Palmer, Corbin and the Restatements") which will provide clear cut answers to questions about the proper scope of equitable remedies. *Great-West*, 534 U.S. at 217. The decision in this case reads this language out of *Great-West*.

A number of ERISA cases from the Supreme Court state that the common law of trusts is a primary source for the development of ERISA federal common law. *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) ("the common law of trusts . . . offers a 'starting point for analysis [of ERISA] . . .'"); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989) ("ERISA abounds with the language and terminology of trust law"); *Central States Pension Fund v. Central Transport Inc.*,

472 U.S. 559, 570, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) (Congress did not explicitly enumerate all duties of ERISA fiduciaries but invoked the common law of trusts to define them).

The *Restatement of Trusts* makes clear that "the remedies of the beneficiary against the trustee are exclusively equitable. *Restatement (Second) of Trusts*, §197, p. 433 (1959) (emphasis added) (hereafter "*Restatement*"). "Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity." III A. Scott & W. Fratcher, *The Law of Trusts*, §197, p. 188, (4th ed. 1988). In addition, the *Restatement* defines a breach of trust as "a violation by the trustee of any duty which as trustee he owes to the beneficiary." *Restatement*, §201, p. 442. This certainly includes a violation of ERISA's notice and fiduciary duty requirements as alleged by Callery in this case.

It is also well established under traditional equitable principles that monetary relief is allowed against the fiduciary or trustee of a trust when an action is brought by the beneficiaries of the trust. *Restatement*, §205, at p. 458, cmt. a, states that a fiduciary is required to place the beneficiary of the trust in "the position he would have been if the trustee had not committed the breach of trust." Equitable remedies involve giving the beneficiaries of a trust the remedies necessary for protection of their interests including compelling a breaching fiduciary to provide redress ". . . either by making specific reparation or by the payment of money or otherwise." *Scott & Fratcher*, § 199.3, p. 206. "Courts may . . . order money payments in the exercise of 'equity' powers" which are thereafter enforced through contempt of court orders. I Dan B. Dobbs, Law of Remedies, §3.1, p. 278-79 (2nd Ed. 1993).

In fact, in her opening appellate brief, Callery challenged Star Buffet to identify any authority for the proposition that payment of money damages from a fiduciary was not typical

relief available at common law equity to an aggrieved beneficiary of a trust. Star Buffet failed to do so. Despite the lack of support in any standard current works for the idea that monetary relief was not typically available at equity for participants and beneficiaries when damage was caused by a breaching fiduciary of a trust, the decision adopts Star Buffet's argument.

The need to analyze whether the relief requested under §502(a)(3) was typically available at equity has been emphasized by the Supreme Court repeatedly, beginning with *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), and continuing through *Varity v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), and *Great-West*. Indeed, this Court very recently emphasized the same analysis in deciding *Millsap*, 368 F.3d at 1252-57, when it engaged in an extensive analysis of whether back pay was a type of relief typically available at equity. In *Millsap*, this Court followed *Great-West's* directive to review and consider current standard works regarding equitable remedies. Based on this analysis, this Court ultimately concluded that back pay was not a type of relief typically available in equity.

The decision in this case, however, does not even attempt that type of analysis. It simply ignores the equitable landscape that is established in the briefing: every current standard work relating to equitable remedies agrees that monetary damages were routinely awarded for loss caused to a trust beneficiary by a breaching fiduciary's violation of its responsibilities. The failure of the decision to engage in the analytical process followed by the Court's decision in *Millsap* and required by *Great-West* requires reconsideration of the decision.

The decision also errs in its analysis when it states that Varity is not available to provide individualized equitable relief for Callery under the circumstances of this case. In *Varity*, the Supreme Court ruled that §502(a)(3) was a reme-

dial provision within the statute that acted as a safety net to provide appropriate equitable relief for participants and beneficiaries for injuries arising from a breach of fiduciary duty where relief was not otherwise available under ERISA. *Varity*, 516 U.S. at 512. *Varity* was decided after *Mertens* and before *Great-West*. *Great-West* did nothing to suggest that the principles outlined in Varity did not remain in place. Indeed, Great-West reaffirmed the holding of Varity that §502(a)(3) was available for "individualized equitable relief for breach of fiduciary obligations." *Great-West*, 534 U.S. at 221, n.5. The court went on to state that

> In Varity Corp., however, it was undisputed that respondents were seeking equitable relief, and the question was whether such relief was "appropriate" in light of the apparent lack of alternative remedies.

Id (emphasis in original). Likewise, it is undisputed that Callery is seeking equitable relief under §502(a)(3). She has not pled otherwise. The only question is what equitable relief is appropriate, given the facts and circumstances of Callery's case. The district court improperly, and the decision likewise improperly, refuses to allow Callery to develop those facts and circumstances to fully determine whether, and what, equitable relief is appropriate to her. The decision errs in affirming the trial court's ruling on this point.

II THE DECISION SHOULD BE RECONSIDERED BECAUSE IT INVOLVES AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE

Under the express language of ERISA, the remedies for violation of the statute's notice and fiduciary duty requirements are found in §502(a)(3). The effect of the decision is to eviscerate the scope of equitable remedies available to participants and beneficiaries under §502(a)(3) when injury is caused to them by a fiduciary's breach of ERISA's requirements.

The decision creates additional problems because its language promotes a double standard under ERISA. Citing *Great-West* as support, the decision acknowledges that recovery of money is available by ERISA plan administrators from participants and beneficiaries under §502(a)(3). Slip Op. at pp. 8-9. Yet the decision's language at Slip Op., pp. 13-17, precludes *any* monetary compensation to participants and beneficiaries for damages related to an ERISA fiduciary's breach of those duties. This is not consistent with the language of *Great-west*. It is also a disparate application of the same remedial language of the statute, depending on who brings a claim for recovery of money under §502(a)(3). Participants and beneficiaries of an ERISA trust may be required to compensate the ERISA plan for an alleged loss under the language of this decision. But fiduciaries who ignore their duties under ERISA do not face the same threat. This is not a correct interpretation of the statute or of *Great-West*. As such, reconsideration of the decision is a matter of exceptional public importance.

A recent Supreme Court ERISA case, decided after briefing was complete in this case, highlights the public importance of the scope of remedies under §502(a)(3). In *Aetna Health Inc. v. Davila*, 542 U.S.___ 124 S.Ct. 2488, 2502, n. 7, 159 L.Ed.2d 312 (2004), the court specifically left open the possibility of make whole relief under §502(a)(3). In a concurring opinion, Justices Ginsburg and Breyer voiced their concern about the "regulatory vacuum" that accompanies ERISA's broad preemptive scope combined with its restricted remedial framework. *Davila*, 124 S.Ct. at 2503. Justices Ginsburg and Breyer indicated their belief that §502(a)(3) should be read to allow remedies providing "make-whole" relief to participants and beneficiaries injured by a fiduciary's dereliction of ERISA duties. *Id*, 124 S.Ct. at 2504. The Tenth Circuit should reconsider this issue.

III CALLERY NEVER LIMITED HER REQUESTS FOR EQUITABLE RELIEF TO ANYTHING LESS THAN THE FULL SCOPE OF REMEDIES AVAILABLE UNDER §502(a)(3)

The decision repeatedly references and discusses particular types of equitable relief that have been identified by Callery that might be available. Slip Op. at pp. 7, 10, and 13. However, the decision wrongly states that Callery has limited the scope of her request for relief. For example, with regard to Callery's claims for equitable relief in the form of accounting for profits and reformation, the decision states:

> Ms. Callery did not assert these arguments before the district court. New arguments presented for the first time on appeal are not properly before the court and, absent extraordinary circumstances, will not be considered.

Slip Op., p. 13.

The statement that Callery failed to assert the right to certain types of equitable relief misapprehends an important point in the record. The Complaint filed in the case requests remedies under §502(a)(3) as well as equitable relief. Complaint, ¶¶ 19, 24 and prayer for relief, ¶ 3; Callery Appendix, pp. 8-10. There is no language in the Complaint limiting in any way the remedies Callery seeks that were typically available at equity. References in the pleadings to specific equitable remedies are not by way of limitation, but are examples of the types of relief Callery sought.

This is made clear in Callery's Opposition Memorandum to Star Buffet's Rule 12(c) Motion to Dismiss. While Callery identified some forms of equitable relief in her Opposition Memorandum that seemed most appropriate, Appendix pp. 70 and 75, the same pleading makes clear that Callery asserts the right to the entire scope of equitable relief that may be available:

> Which particular equitable remedy Callery is entitled to is not something Callery has attempted to spell out in

> detail in her Complaint. The suitability or availability of one or more equitable remedies may need to await discovery.

Appendix at p. 75.

The idea that Callery limited her recovery under equitable doctrines in any way or conceded some of those remedies is wrong. It is especially troubling in light of the fact that the case was dismissed before any discovery of any type could occur. A hallmark of equitable remedies is their sensitivity to the facts and circumstances of a particular case. Equity tailors its remedy to be appropriate to those facts and circumstances. 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, §109 at 140-41 (Spenser W. Symons, Ed., 5th Ed. 1941). Making the determination, as the decision does, that certain types of equitable relief are not available for Callery before the facts are available to evaluate that very question is improper.

The decision states that Gallery's request for payment of the policy amount of $100,000 indicates a request for legal relief that is outside §502(a)(3)'s equitable remedy scope. Slip Op. at 7. But this is inaccurate. The references in the Complaint to the amount of the policy are simply Callery's request for equitable relief that is broad and a efficient enough to allow her to be made whole. Without some mechanism to allow for the risk of economic loss to be shifted to the defendants in the case, rather than to be left with Callery, she is not made whole. *Schleibaum v. Kmart Corp.*, 153 F.3d 496, 503-4 (7th Cir. 1998). That risk of loss has a specific value under the facts of this case: the face amount of the policy. The language in the Complaint referencing the amount of the life insurance policy is simply Callery's measure of the loss she has suffered. Contrary to the decision, these statements do not transform her claims for equitable relief under §502(a)(3) into impermissible legal relief.

In addition, the decision fails to defer to any degree to the position taken by the Department of Labor ("DOL") in this case. The DOL *amicus* brief is unequivocal in stating the DOL's position that monetary damages are available to ERISA participants under §502(a)(3) when they have been damaged by an ERISA fiduciary's breach of its fiduciary duties. This position, taken by the regulatory body that knows ERISA better than any other, should be given significant weight. *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 1346, 158 L.Ed.2d 40 (2004) (Scalia, J., concurring, stating that considerable deference should be accorded DOL position in that ERISA case).

Despite the status of the DOL and its experience and judgment in enforcing and interpreting ERISA, the decision pays little heed to its position. If indeed, as the decision acknowledges, "the issue is close," Slip Op. at 17, certainly the unequivocal and long-standing DOL position on this issue should be accorded greater weight on this issue of first impression than the decision provides.

CONCLUSION

The decision should be reheard and modified for three separate reasons. First, the decision improperly holds that §502(a)(3) does not allow for monetary relief when ERISA participants or beneficiaries have been damaged as a result of a fiduciary's breach of its duties. This is inconsistent with the holdings of the Supreme Court in *Mertens*, *Varity* and *Great-West*. It is also inconsistent with the analysis previously taken by this Court in *Millsap* of carefully evaluating standard current works relating to equitable relief to determine whether the relief sought in a given case under §502(a)(3) was typically available at equity.

Second, the issue in this case is a matter of exceptional public importance. To implement the fundamental polices underlying ERISA, the Court should reconsider the decision.

Third, the decision errs when it states that Callery has waived some of the rights to equitable relief that would otherwise be available to her under §502(a)(3).

Nothing in Callery's pleadings and argument before the trial court justifies this conclusion. Because equitable remedies are flexible and individually suited to the needs of each plaintiff, discovery is necessary to flesh out which equitable remedies are available and which are not. Dismissing the case before discovery has occurred is improper in this matter.

There is no question Callery has suffered a significant loss as a result of Star Buffet's breach of fiduciary duty in not informing her of what the exclusions and limitations of the insurance policy were. The decision holds that no meaningful relief is available to her under §502(a)(3). It is unwarranted under Supreme Court precedent and the precedent of this Circuit. Callery respectfully requests rehearing by the panel of the matter and suggests rehearing en banc of the case.

DATED this 24th day of December, 2004.

By: Brian S. King
BRIAN S. KING
Attorney for Plaintiff

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed Jan. 10, 2005]

No. 03-4097

SANDY CALLERY,
Plaintiff-Appellant,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK; JB'S RESTAURANTS, INC.; JB'S FAMILY RESTAURANTS; STAR BUFFET,
Defendants-Appellees.

AARP; SECRETARY OF LABOR,
Amici Curiae.

ORDER

Before KELLY, HOLLOWAY, and LUCERO, *Circuit Judges.*

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: [Illegible]
Deputy Clerk

APPENDIX G

ERISA § 101(a)

Sec. 101. Duty of Disclosure and Reporting

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with § 104(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in §102(a)(1); and

(2) the information described in §§104(b)(3) and 105(a) and (c)

ERISA §404(a)(1)

Sec. 404. Fiduciary Duties

(a)(1) Subject to §§403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries, and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

ERISA §502(a)(3)

Sec. 502. Civil Enforcement

(a) A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations of (ii) to enforce any provisions of this title or the terms of the plan; . . .

28 U.S.C. §1254(l)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2 02 VX-0524C

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC. and STAR BUFFET, INC.,

Defendants.

COMPLAINT

Plaintiff Sandy Callery ("Callery"), through her undersigned counsel, complains and alleges against Defendants as follows:

PARTIES, JURISDICTION AND VENUE

1. Callery is a resident of the State of Utah and at all relevant times was an employee of J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc. and Star Buffet, Inc. ("Star Buffet").

2. Callery was provided various employee welfare benefits through her employment with J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet. She elected to obtain life insurance on John Callery, her husband, from 1994 through 1997, through The United States Insurance Company in the City of New York ("US Life").

3. US Life issued a policy of life insurance on employees of J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet and their spouses and dependents as part of welfare benefits provided by J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet to their employees. The life insurance policy covering John Callery was in the amount of $100,000.

4. J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., Star Buffet, and US Life are each corporations which do business within the State of Utah. In addition, each of these Defendants acted either as an administrator or fiduciary under an ERISA plan established pursuant to 29 U.S.C. § 1001 *et seq* of the Employee Retirement Income Security Act of 1974 ("ERISA").

5. Callery's claims in this Complaint are brought under ERISA. This Court has jurisdiction of this case under 29 U.S.C: §1132(e)(1). Venue is appropriate under 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391 because the Defendants may be found in the State of Utah and the breach of ERISA occurred in the State of Utah.

6. The remedies Callery seeks under the terms of ERISA are for the benefits due her in the amount of $100,000 for life insurance on John Callery's life and for declaratory relief and an injunction ordering the Defendants to provide Callery the life insurance proceeds which she paid for.

FACTUAL BACKGROUND

7. Callery realleges and incorporates by reference paragraphs 1 through 6 as though fully set forth herein.

8. In 1994, Callery's employer, offered Callery and its other employees the opportunity to purchase life insurance for themselves or their spouses or children through US Life. Callery purchased a $100,000 life insurance policy for her

husband, John Callery. A copy of the application from 1994 is attached hereto as Exhibit A.

9. US Life issued a policy of life insurance for John Callery sometime shortly after receiving Callery's application.

10. Callery paid the premium for John Callery's life insurance from 1994 through the date of his death, February 28, 2000.

11. Shortly after John Callery's death, Callery sent to US Life a claim for the life insurance proceeds.

12. US Life denied Callery's claim on May 19, 2000. It stated that John Callery was not eligible for coverage because the policy insuring John Callery terminated on the date of the Callery's divorce, August 29, 1997.

13. Termination of a spouse's eligibility for life insurance coverage under the US Life policy upon the date of divorce was outlined as an exclusion in the policy of insurance, according to US Life.

14. However, at no time before the date of Sandy Callery's divorce from John Callery, or within 45 days thereafter, did Callery have a copy of the US Life insurance policy on John Callery. That policy had never been distributed to Callery or any other employees of J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., or Star Buffet at any time before or after the date of Callery's divorce from John Callery.

15. Callery was unaware of the exclusion for life insurance coverage on John Callery once she divorced him until she was made aware of the exclusion in the May 19, 2000, letter from US Life.

16. As of the date of this Complaint, US Life has failed to provide a refund to Callery of the premiums paid to US Life from the date of her divorce from John Callery to the date of his death.

FIRST CAUSE OF ACTION
(Violation of 29 U.S.C. §1021)

17. Callery realleges and incorporates by reference paragraphs 1 through 16 as though fully set forth herein.

18. In their capacity as the administrator of the Plan or as agents of the administrator for the Plan, the defendants failed to furnish Callery with a copy of the Summary Plan Description ("SPD") or other document stating or summarizing the terms of the Plan, as required by 29 U.S.C. §1021.

19. The failure of the Defendants to provide the document described in paragraph 18 is a violation of 29 U.S.C. § 1021 and gives rise to a remedy under 29 U.S.C. §1132(a)(3), in the form of payment of insurance on the life of John Callery in the amount of $100,000 for which Callery paid premiums from 1994 through the date of his death, plus prejudgment interest to the date of judgment and Plaintiff's attorneys' fees and costs incurred under 29 U.S.C. §1132(g).

SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

20. Callery realleges and incorporates by reference paragraphs 1 through 19 as though fully set forth herein.

21. The Defendants, as plan administrator or as agents of the plan administrator, acted as fiduciaries under the ERISA plan.

22. As fiduciaries to Callery, the Defendants had the obligation under 29 U.S.C. §1104(a)(1) to act solely in the interest of Callery and for the exclusive purpose of providing her benefits, and with the care, skill, prudence and diligence that a prudent person acting in like capacity and familiar with Plan affairs would use in carrying out the Plan purposes.

23. The Defendants have violated their fiduciary duties under ERISA. As a result, Callery has suffered loss in the

form of denied life insurance benefits on the life of John Callery.

24. Callery is entitled to judgment in her favor in the form of equitable relief providing for payment of the insurance on the life of John Callery in the amount of $100,000 for which she paid from 1994 through the date of John Callery's death, plus prejudgment interest and payment of Callery's attorneys' fees and costs, pursuant to 29 U.S.C. §1132(g).

WHEREFORE Callery prays for judgment on her claims as follows:

1. On Callery's First Cause of Action, for judgment in Callery's favor in the amount of $100,000, plus payment of prejudgment interest and attorneys' fees and costs;

2. On Callery's Second Cause of Action, for judgment in Callery's favor in the amount of $100,000, plus payment of prejudgment interest and attorneys' fees and costs; and

3. For such further equitable relief as the Court deems appropriate in the case.

DATED this 31 day of May, 2002.

KING, BURKE & SCHAAP, P.C.

By: /s/ Brian S. King
BRIAN S. KING
MARCIE E. SCHAAP
NICOLE T. DURRANT

Attorneys for Plaintiff

Plaintiff's address:
639 East 5640 South
Murray, UT 84107

THE UNITED STATES LIFE Insurance Company
A USLIFE COMPANY
APPLICATION FOR LIFE INSURANCE

Please print or type all information requested.

NOTE: If you have previously applied for coverage, a copy of that application must be attached.

Group Policy Number VD72224D

Employee's annual salary 19,700

Employee's date of employment 5/31/83

1. Name of Employer/Association J.B's Restaurants, INC

2. Employee's/Member's full name SANDRA (FIRST) L. (MIDDLE) CALLERY (LAST) Soc. Sec. No. 528-80-3300

3. Spouse's full name John (FIRST) R. (MIDDLE) Callery (LAST) Soc. Sec. No. 222-38-8116

4. Home Address 1639 (NUMBER) E (STREET) 5640 So (CITY) Murray (STATE) Ut 84107 (ZIP)

5. Check life insurance plan(s) desired:

a) Life insurance for employee? Amount $100,000 ☐ None

b) Life insurance for spouse? Amount $100,000 ☐ None

c) Life insurance for children? Amount ~~$7,500~~ $10,000 ☐ None

Underwriting Decisions/Date
EE:
SP:
CH:
FOR HOME OFFICE USE

6. Complete the following for employee/member and spouse if applying for insurance:

	Age	Date of Birth (month/day/year)	Place of Birth	Height	Weight	Sex
Employee/Member	42	2/26/52	Richfield, Ut	5 ft. 6 in.	146 lbs.	Male (Female)
Spouse	40	12/25/53	Milford, Mit	5 ft. 10 in.	160 lbs.	(Male) Female

	EMPLOYEE/MEMBER	SPOUSE
7. Have you or your spouse ever had chest pains, heart trouble, liver trouble, high blood pressure, albumin or sugar in your urine, tuberculosis, diabetes, cancer, tumors or ulcers?	☐ Yes ☑ No	☐ Yes ☑ No
8. Have you or your spouse, during the past 5 years, consulted any physician or other practitioner or been confined or treated in any hospital or similar institution?	☐ Yes ☑ No	☐ Yes ☑ No

If "yes" to any part of questions 7 and 8, give details below. Use a separate sheet of paper if more space is needed for answers:

Question No.	Does Question Apply to Employee/Member or Spouse	Condition	Date Occurred	Duration	Degree of Recovery	Names & Addresses of Physicians Hospitals or Clinics Consulted

9. Unless you otherwise request below, the employee/member named in 2 above will be the beneficiary of any spouse and children insurance applied for, and the spouse named in 3 above will be the beneficiary of any employee/member insurance applied for. For an employee/member, if you have no spouse or children and no one is named below, proceeds will be payable to the estate of the insured:

Name of proposed insured _____ Name of beneficiary Dorothy Bridge Relationship Mother

AUTHORIZATION AND DECLARATION OF EACH PERSON GIVING A STATEMENT OF INSURABILITY

1. I authorize the sources stated below to give to United States Life, or any consumer reporting agency acting on its behalf, information about me. Such information will pertain to my employment, other insurance coverage, and medical care, advice, treatment or supplies for any physical or mental condition. Authorized sources are: any physician or medical professional; any hospital, clinic or other medical care institution; any insurer; the Medical Information Bureau; any consumer reporting agency; any employer.
2. I understand that this information will be used by United States Life to determine eligibility for insurance.
3. I understand that I may revoke this authorization at any time. I agree that such revocation will not affect any action which United States Life has taken in reliance on the authorization.
4. I understand that this authorization will not be valid after 30 months, if not revoked earlier.
5. I know that I have the right to receive a copy of this authorization if I request one.
6. I agree that a photocopy of this authorization is as valid as the original.
7. Employee/member authorizes deductions from earnings or dues for the cost of this insurance.
8. To the best of my knowledge and belief, all the statements made above are true and complete.
9. I understand that my application for group insurance will be accepted or declined on the basis of these statements. Insurance shall take effect only if a certificate is issued based on this application and the first premium is paid in full (a) during the lifetime of all proposed insureds and (b) while there is no change in the insurability and health of all such persons from that stated in this application.

11-13-94 ▶ Sandra L. Callery

EXHIBIT A

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:02CV0524C
Judge Tena Campbell

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC. and STAR BUFFET, INC.,

Defendants.

AFFIDAVIT OF SANDY CALLERY

STATE OF UTAH)
:ss.
County of Salt Lake)

Comes now Sandy Callery, being first duly sworn upon oath, who deposes and states as follows:

1. I am over the age of 18 years of age, am competent to give this testimony and have personal knowledge of the matters of which I testify.
2. I have reviewed the allegations in the Complaint for this case and verify that they are true and accurate to the best of my knowledge.

3. John Callery and I had two children during our marriage. The first, Robert, was born May 22, 1981, and the second, Amber Marie, was born May 17, 1982.

4. Under our Decree of Divorce, John had the obligation to pay child support for both Robert and Amber until they turned eighteen.

5. I was not aware that I could not maintain life insurance coverage on John through insurance benefits at work after our divorce. If I had known that I could not obtain any life insurance coverage on my ex-husband through my employment benefits once we divorced, I would have made arrangements to obtain insurance on John's life from some other source. It was critical for me to know that, in the event of John's death, I would have insurance coverage for the support of our children.

FURTHER AFFIANT SAYETH NOT.

DATED this 23 day of September, 2002.

/s/ Sandy Callery
SANDY CALLERY

On the 23 day of September, 2002, personally appeared before me, Sandy Callery, who acknowledged to me that she has read the foregoing document, that the same is true to the best of her knowledge and as to matters stated therein upon information and belief, she also believes them to be true.

[NOTARY SEAL]

/s/ Linda A. Purdy
LINDA A. PURDY
Residing in Salt Lake City, Utah

APPENDIX J

UNITED COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-4097

SANDY CALLERY,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC. and STAR BUFFET, INC.,

Defendants.

Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Tena Campbell

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT AND REVERSAL OF THE DISTRICT COURT

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STATEMENT OF INTEREST

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, et seq. As the Federal officer with primary enforcement authority for numerous provisions of ERISA, the Secretary has a significant interest in the proper application of ERISA's remedial provisions. This case presents an important and recurring remedial issue: whether Section 502(a)(3) of ERISA, 29 U.S.C.§ 1132(a)(3), authorizes actions to recover monetary losses from fiduciaries who have breached their obligations and harmed individual beneficiaries. Under the district court's interpretation of Section 502(a)(3), fiduciaries could violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused. The Secretary disagrees with the district court's interpretation and, therefore, pursuant to Federal Rule of Appellate Procedure 29, respectfully submits this brief as amicus curiae.

STATEMENT OF THE CASE [1]

Sandy Callery was employed by J.B.'s Restaurants, Inc., J.B's Family Restaurants, Inc. and Star Buffet, Inc. ("Star Buffet"). Complaint ¶ 1. Star Buffet offered life insurance coverage to its employees through a policy issued by United States Life Insurance Company ("U. S. Life"). Complaint IT 8. In 1994, Sandy Callery elected to obtain life insurance coverage worth $100,000 on her husband, John Callery, through the U.S. Life policy. *Id.* Although she and her husband divorced in 1997, she continued to pay life insurance premiums for Mr. Callery's life insurance until the date of his death on February 28, 2000. Complaint ¶ 10.

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[1] The Secretary takes no position on the factual matters presented by this case. The Statement of the Case is taken from the plaintiffs complaint and affidavit and is not intended to express the Secretary's opinion about how the Court should rule on any particular fact.

Callery applied for the life insurance benefits from U.S. Life upon Mr. Callery's death. Complaint ¶ 11. On May 19, 2000, U.S. Life denied the claim, stating that the policy had terminated on August 29, 1997, the date of the Callery's divorce. Complaint ¶ 12. According to U.S. Life, termination of a spouse's eligibility for life insurance upon divorce was outlined in an exclusion in the insurance policy. *Id.* Callery was never provided with a summary plan description that outlined the life insurance policy's scope of coverage and exclusions, nor had the insurance policy itself been distributed to Callery or other Star Buffet employees. Complaint ¶¶ 14-15. Accordingly, Callery was unaware of the exclusion until U.S. Life denied her claim. Complaint ¶15.

Callery brought an action against Star Buffet under Section 502(a)(3) of ERISA for allegedly breaching its fiduciary obligations by failing to inform her of the insurance policy's exclusion. She contends that if she had been informed of the exclusion, she would have made other arrangements to obtain coverage to protect her ability to provide financially for the Callery's children. Affidavit of Sandy Callery ¶¶ 3-5. Callery seeks equitable relief in the form of $100,000, the face amount of the policy, prejudgment interest, and attorney fees and costs. Complaint ¶ 24.

Star Buffet moved for judgment on the pleadings, arguing that Callery was seeking money damages, not equitable relief, and that, because money damages are not available under ERISA Section 502(a)(3), her complaint should be dismissed. At a January 7, 2003 hearing, the district court held in favor of Star Buffet. Callery timely appealed.

ARGUMENT

"EQUITABLE RELIEF' WITHIN THE MEANING OF SECTION 502(a)(3) OF ERISA INCLUDES THE RECOVERY FROM A FIDUCIARY OF ANY DIRECT MONETARY LOSSES CAUSED BY THE FIDUCIARY'S BREACH OF ITS DUTIES

ERISA was designed to protect the interests of participants and beneficiaries of employee benefit plans by establishing standards of conduct, responsibility, and obligations for fiduciaries. ERISA § 2(b), 29 U.S.C. § 1001(b). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc.*, 472 U.S. 559, 570 (1985), citing S. Rep. No. 93-127, p. 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865 ("'The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.'); H.R. Rep. No. 93-533, p. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4649 (identical language). At the core of ERISA's fiduciary obligations are the duties of loyalty and prudence, which are based on trust law principles and are among the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), allows participants and beneficiaries to sue for "equitable relief' for breaches of fiduciary duty that cause them individual harm. *Varity v. Howe*, 516 U.S. 489 (1996). Although "equitable relief' is not defined in ERISA, the Supreme Court has held that, to determine whether relief is equitable, courts should look to standard texts on remedies and trusts in order to determine how the relief was characterized when the bench was divided between equity courts and law courts. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U. S. 204, 212 (2002). To qualify as equitable under Section 502(a)(3), the relief must have been "typically" available in equity and

not simply "occasionally" available in equity. *Id.* at 214. Thus, Section 502(a)(3) does not authorize damages against *non-fiduciaries*, which were "occasionally awarded in equity cases," but were classically legal in nature and typically awarded in a court of law. *Id.* at 215. However, as discussed below, because the relief that Sandy Callery seeks is against a *fiduciary*, it was exclusively available in equity and treated as equitable by standard texts on remedies and trusts. Accordingly, the relief she seeks is "equitable relief" within the meaning of ERISA Section 502(a)(3).

A. A monetary award against a fiduciary to redress a fiduciary breach is an equitable remedy because it was typically available in equity

Trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity." III. A. Scott, *The Law of Trusts*, § 197, at 188 (4th ed. 1988). See G. Bogert, *The Law of Trusts and Trustees*, § 870, at 123 (rev. 2d ed. 1995) ("The court of equity first recognized the trust as a legal institution and has fostered and developed it"). "In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest." *Restatement (Second) of Trusts*, § 2, at 9 (1959); *id.* § 74, at 192 (beneficiary has equitable interest in the trust). "The duties of the trustee with respect to trust property are equitable duties. By this [it] is meant that they are enforceable in a court of chancery or a court having and exercising the powers of a court of chancery." I. A. Scott, *The Law of Trusts*, § 2.7, at 48-49.

As the *Restatement of Trusts* emphasizes, "the remedies of the beneficiary against the trustee are *exclusively equitable*." *Restatement (Second) of Trusts*, § 197, at 433 (emphasis added). During the days of the divided bench, beneficiaries could not obtain relief in a court of law because they did not hold legal title to the property of the trust. I. A. Scott, The

Law of Trusts, § 1, at 4; III. Scott, *The Law of Trusts*, § 197, at 188. They could only seek relief in a court of equity to enforce their equitable interests. I. A. Scott, *supra*, § 1; III. A. Scott, *supra*, § 197. The equity court, unlike the law court, could compel the trustee to act in accordance with its fiduciary duties and compensate the beneficiary for losses when the trustee's action caused the beneficiary to suffer harm. III. A. Scott, *The Law of Trusts*, §§ 197; 199.

As the Supreme Court has explained, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it" *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). As Professor George Gleason Bogert explains in his leading treatise:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with *whatever remedy is necessary* to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties.

G. Bogert, *The Law of Trusts and Trustees*, § 861, at 3-4 (emphasis added). This is in contrast to the legal courts where plaintiffs were entitled to relief as a matter of right, *see Curtis v. Loether*, 415 U.S. 189, 196-97 (1974), and where "[t]he distinguishing characteristic of legal remedies [was] their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern[ed] their use." 1 Pomeroy, *A Treatise on Equity Jurisprudence*, § 109, at 140 (5th ed. 1941).

The trust relationship, therefore, arises in equity and creates equitable rights and duties, which, when breached, are redressed exclusively through equitable remedies. Whether or not such a remedy against a fiduciary consists of a money award does not change its character as an equitable remedy. In actions such as this where a beneficiary sues a *fiduciary* for

its breach of duty, the fiduciary could be required to restore the beneficiary to the "position in which he would have been if the trustee had not committed the breach of trust." *Restatement (Second) of Trusts*, § 205, at 458, cmt. a; *see also id.* § 205, at 458. *See also* III. A. Scott, *The Law of Trusts*, § 199.3. at 206-07 ("If the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise."). *See* III. A. Scott, *The Law of Trusts*, § 199, at 203-04 & 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).[2]

At least two circuit courts have held that monetary relief is equitable relief within the meaning of ERISA Section 502(a)(3) when the relief is sought against a fiduciary. In *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000), the employer's fiduciary breach caused Ms. Bowerman to lose health insurance coverage for her pregnancy. Bowerman sued under Section 502(a)(3) seeking the amount of the pregnancy-related expenses that would have been covered but for the breach. The Seventh Circuit upheld Ms. Bowerman's claim for monetary relief under Section 502(a)(3) because it

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[2] The *Restatement of Trusts* gives several examples of the types of monetary awards fiduciaries must pay to redress their breaches. For instance, Illustration 1 § 205, at 459, cmt. c of the *Restatement* explains: "A is [the] trustee of $10,000 in cash. As a result of his negligence, the money is stolen. A is liable for $10,000." Illustration 3 notes: "A is [the] trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by B. A is liable for $600." The *Restatement* makes it plain that all of these remedies are equitable. See *Restatement (Second) of Trusts*, § 197, at 433-34. The *Restatement* goes on to explain that, if a fiduciary wrongly holds trust property, a beneficiary can additionally recover unjust enrichment as a separate category of relief. See *id.* § 205(b).

was based on a violation of fiduciary duty. The court recognized that Section 502(a)(3) excludes legal relief such as damages (citing *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993), but explained that "when sought as a remedy for breach of fiduciary duty [, this kind of relief, which the Court viewed as restitution] is properly regarded as an equitable remedy *because the fiduciary concept is equitable*." *Bowerman*, 226 F.3d at 592 (quoting *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000)) (emphasis added). In support for its ruling, the court cited *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 144 (2d Cir. 1999), which awarded monetary relief under Section 502(a)(3) for a fiduciary's negligent handling of life insurance application which resulted in the participant's loss of coverage. The court in Strom explained that beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." *See also Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997).[3]

Star Buffet argued below that this Court has already held in *Moffett v. Haliburton Energy Servs., Inc.*, 291 F.3d 1227, 1234 (10th Cir. 2002), that monetary relief against a fiduciary is not equitable. In *Moffett*, a participant in a disability plan sued under state law and ERISA after he was redetermined eligible for benefits. Although the plaintiff sought statutory penalties and attorney fees, as well as any other "remedial or equitable remedies available under ERISA," *id.* at 1230, the court noted that "he did not identify in his complaint the specific equitable relief that he desires." *Id.* at 1234. Relying on *Mertens* and *Great-West*, this Court stated that "to the extent

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[3] In *Ream*, the trustee conveyed pension plan assets to the plan administrator who then absconded with the assets. The court ordered the trustee to pay the beneficiary the amount of his vested interest in the plan, characterizing its order as equitable restitution under Section 502(a)(3). 107 F.3d at 153.

[that] we read his complaint as seeking non-statutory remedies and/or damages, in the form of monetary compensation for economic [and] other harm suffered because of the delay in [the] receipt of his benefits," that relief was not available under ERISA. *Id.* This Court had already concluded, however, that Moffett's "conclusory allegations fail to establish the basis for an alleged breach of fiduciary duties." *Id.* at 1233. Moreover, the court was speaking generally about the availability of damages under the plaintiffs numerous theories and was not specifically addressing remedies in terms of fiduciary breach. *Id.* at 1234 ("Moffett seeks a variety of remedies for all of the alleged ERISA violations"). Thus, fairly read, *Moffett* says nothing about whether monetary relief is available to remedy a fiduciary breach, and given that the court found no fiduciary breach, the court certainly did not hold such relief to be unavailable if there is a breach of fiduciary duty.

B. Mertens and Great-West support the conclusion that a monetary award to remedy a fiduciary's breach is equitable under Section 502(a)(3)

The Supreme Court addressed requests for monetary relief under Section 502(a)(3) in *Mertens*, 508 U.S. 248 and *Great-West*, 534 U.S. 204. Both of these cases involved suits against *non-fiduciaries* and, consequently, do not answer the precise question presented here. While some courts have read *Mertens* and *Great-West* as barring a monetary recovery against fiduciaries as well as non-fiduciaries, *see, e.g., Rego v. Westvaco Corp.*, 319 F.3d 140 (4th Cir. 2003), the rationale of the *Mertens* and *Great-West* decisions do not support that conclusion.[4]

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[4] In *Rego*, the Fourth Circuit erroneously reasoned that the Supreme Court in *Mertens* had rejected the availability of monetary relief against a breaching fiduciary, absent the ability to trace particular funds to the fiduciary. 319 F.3d at 145. As we discuss, this decision and the others like

In *Mertens*, an employer allegedly underfunded its retirement plan and drove it out of existence. The plan participants sued under Section 502(a)(3) for the monetary losses to the plan resulting from their employer's alleged fiduciary breach. They did not seek the losses from the employer-fiduciary but, instead, sought to recover from a non-fiduciary actuary whom they claimed had knowingly participated in the fiduciary's breach. The Supreme Court refused to classify the money sought against a non-fiduciary as equitable relief under Section 502(a)(3). The Court explained that the participants did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution . . . [but] what petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief." 508 U.S. at 255.

In *Great-West*, a health plan sued a plan beneficiary under Section 502(a)(3) seeking a monetary award for breach of a provision in the health insurance contract that required the beneficiary to pay to the plan the proceeds from a personal injury settlement.[5] The Court held that Great-West had asserted nothing more than an ordinary contract claim for damages. As in *Mertens*, the monetary relief it sought for breach of contract was not "typically available in equity" and therefore was not recoverable under Section 502(a)(3). 534 U.S. at 210.

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it that either reject monetary awards outright against plan fiduciaries or require equitable tracing, *see*, *infra*, note 9 and cases cited therein, misapprehend both *Mertens* and *Great-West* and the common law of trust to which these cases refer. Moreover, the *Rego* decision is in conflict with the well-reasoned decisions of the Seventh and Second Circuits in *Bowerman* and *Strom* which recognize that monetary relief against a breaching fiduciary is inherently equitable. *See*, *supra*, pp. 6-7.

[5] Although the plan sued the beneficiary, the disputed funds had actually been paid to an attorney and a trust; neither the trust nor the attorney had been named as defendants. *Great West*, 534 U.S. at 208.

Mertens and *Great-West* thus both involved Section 502(a)(3) suits against *non-fiduciaries*, and in each case, the plaintiffs contended that the monetary relief they sought from non-fiduciary defendants was "equitable" because courts of equity could have granted such relief under the common law of trusts. *Great-West*, 534 U.S. at 219; *Mertens*, 508 U.S. at 255-56. Together these decisions stand for the proposition that monetary relief in such suits cannot be considered "equitable" just because courts of equity had the power to grant such relief under the common law of trusts. As the Supreme Court explained in *Mertens*, courts of equity sometimes granted purely *legal* remedies, and the money damages sought from the non-fiduciary defendant in *Mertens* was just that—*legal* relief that would have been available in a court of equity under the common law of trusts. *Id.* at 256.[6]

Courts of equity often granted legal relief against non-fiduciaries under the common law of trusts. For example, when both a trustee/fiduciary and a non-fiduciary harmed the trust in the same transaction, the beneficiary could bring an equity action to enforce equitable rights against the fiduciary and a law action to enforce legal rights against the non-fiduciary. *See* IV. A. Scott, *The Law of Trusts*, § 282.1, at 30. However, the common law did not force the beneficiary to bring two separate suits—one in equity and one at law. Instead, the beneficiary could sue both parties in the equity court in order to avoid multiple suits. *Id.*; *see also Restatement of Trusts* § 282, at 45, cmt. e.

Accordingly, the Court reasoned in *Mertens* that it would effectively read the "equitable" limitation out of Section 502(a)(3) if it expanded the scope of available relief to include these legal remedies that were sometimes awarded by courts of equity. 508 U.S. at 256. The present case, by con-

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[6] *See also Great-West*, 534 U.S. at 219 (the "special equity-court powers applicable to trusts" do not define the reach of Section 502(a)(3)).

trast, involves relief that was typically available in equity (and only in equity): monetary relief against a fiduciary to restore to a beneficiary losses resulting directly from a fiduciary breach. Such relief is equitable not simply because a common law court of equity would have granted it, but because *any* relief, monetary or otherwise, in favor of a beneficiary against a *fiduciary* to remedy that fiduciary's own breach is and always has been equitable relief. *See Restatement of Trusts*, § 197; supra, Section A. (pp. 5-7).[7]

Nevertheless, Star Buffet argued below that relief is "equitable" under Great-West and Mertens only if the particular category of relief sought was available in equity without regard to the law of trusts or the existence of a fiduciary relationship. Under this reading of the Supreme Court's decisions, "equitable relief" refers to such remedies as injunctions, equitable liens and constructive trusts, but not the recovery of direct economic losses, irrespective of whether the defendant is a fiduciary or the claim arises from a breach of trust. In support of this view, Star Buffet pointed to the Supreme Court's rejection of the idea that "equitable relief" encompasses every kind of relief that a court of equity could grant under the special powers applicable to trusts. *Great-West*, 534 U.S. at 219-20. The courts of equity had power to award legal as well as equitable remedies against non-fiduciaries.

As discussed above, however, the recovery of losses from breaching fiduciaries is a separate category of relief that was

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[7] Justice Scalia's dissenting opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), on which the Court relies in *Great-West*, bolsters the Secretary's view. There, Justice Scalia pointed out that "the term 'damages' refers to money awarded as reparation for injury resulting from breach of *legal* duty." *Id.* at 913 (emphasis added). A fiduciary's duty to the beneficiary is clearly equitable and therefore remedies for its breach fall outside of this definition of "damages." The *Restatement of Trusts* is replete with references to the "equitable duties" of the trustee and the "equitable interests" of the beneficiaries. *See, e.g.*, § 2, at 9-10; § 74, at 192.

typically (indeed exclusively) available in equity, and is therefore available under Section 502(a)(3) of ERISA. Under the common law, *Great-West's* claim against a non-fiduciary defendant was purely a claim for liability for breach of contract—a legal claim noluially remedied by legal relief, irrespective of the special powers of trust-law courts. 534 U.S. at 209-11 & 219-20. By way of contrast, the common law claim most closely paralleling Callery's is that of a beneficiary against a trustee for breach of trust—an equitable claim typically, historically and exclusively remedied in the courts of equity. Neither *Mertens* nor *Great-West* support the proposition that Congress intended that the courts should ignore settled trust-law understandings dating from the days of the divided bench in fashioning remedies against fiduciaries who breach their trust-law obligations. Indeed, "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). *See Also Michael H. v. Gerald D.*, 401 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (when historical practice determines content of current legal rule, pertinent historical practice is to be identified with specificity, not generality). Here, the "most specific tradition available," *id.*, is the unbroken historical tradition of permitting precisely the recovery from fiduciaries sought here, at equity and only at equity.

The Secretary's interpretation of Section 502(a)(3) draws additional support from ERISA's sensible allocation of responsibility between fiduciaries and non-fiduciaries as described by the Supreme Court in *Mertens*. As the Supreme Court explained, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262; *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000) (emphasizing that "the common law of trusts sets limits on restitution actions against defen-

dants other than the principal 'wrongdoer,' which the Court referred to as the fiduciary).

Accordingly, the Court explained that the Act provides only limited relief against non-fiduciaries ("persons who had no real power to control what the plan did," *Mertens*, 508 U.S. at 262), as opposed to the fiduciaries who have primary responsibility for the administration and control of benefit plans:

> All that ERISA has eliminated . . . is the common law's joint and several liability for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.

Id. (emphasis in original). Since the primary responsibility for control of the plan rests with the fiduciary, so too does the attendant liability.

Contrary to the statutory scheme, therefore, the more restricted reading of "equitable relief' adopted by the district court would leave beneficiaries without any remedy for serious violations of ERISA's fiduciary provisions. A fiduciary, for example, could deliberately mislead a participant (*e.g.*, by misrepresenting the terms or existence of health coverage), cause the participant to incur substantial medical bills in reliance on the misrepresentation, and evade responsibility for the loss. The participant would have no remedy under ERISA if the recovery for the loss were not "equitable" relief.[8] Moreover, any state-law claims based on the fiduci-

[8] Although Sections 409, 29 U.S.C. § 1109, and 502(a)(2), 29 U.S.C. § 1132(a)(2), of ERISA expressly permit the recovery of losses sustained by the plan as a whole, these provisions do not apply to losses sustained by individual participants. Fiduciary misconduct resulting in individual injuries can only be redressed by the recovery of equitable relief under

ary's misconduct would be preempted. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-57 (1987) (ERISA's civil enforcement scheme is exclusive and preempts alternative state remedial schemes). Such a result is neither consistent with ERISA's remedial purposes, nor compelled by *Mertens* or *Great-West*. To the contrary, as the Supreme Court stated in its post-*Mertens* opinion in *Varity*, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." 516 U.S. at 513.

C. A beneficiary may recover the direct monetary losses resulting from a fiduciary breach regardless of whether or not the fiduciary was unjustly enriched by its misconduct

A fiduciary has an equitable duty to pay monetary losses caused by a fiduciary breach, regardless of whether it was unjustly enriched. As explained above, a fiduciary must remedy all harm a beneficiary suffers from its breach. Whether that remedy comes in the form of a money payment, injunction or both, the common law of trusts considers it "equitable." *See Restatement of Trusts*, § 197. A fiduciary's equitable obligation to redress losses caused by a breach derives directly from the fiduciary duty itself, not from unjust enrichment. See, supra, Section A. (pp. 5-7).

The *Restatement of Trusts* confirms that a money award redressing a fiduciary breach maintains its status as equitable relief even absent unjust enrichment. The *Restatement* enumerates several categories of equitable remedies beneficiaries may obtain from a trustee-fiduciary for breach of duty. One category rests on unjust enrichment. *Restatement (Second) of Trusts* § 205(b). As an entirely separate category, the *Restatement* sets forth relief based on harm to the trust caused

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Section 502(a)(3), 29 U.S.C. § 1132(a)(3), of ERISA. *Varity*, 516 U.S. at 510-15.

by the fiduciary breach. *Id.* § 205(a). The *Restatement* gives several examples of this latter category, all of which involve monetary awards fiduciaries must pay to remedy losses caused by their breaches, and none of which involves an unjustly enriched fiduciary. *See id.* § 205, cmt. c. and illustrations at 459. The *Restatement* makes plain that these remedies are equitable. See id. § 197

Several federal appellate decisions illustrate the application of the *Restatement*'s rule in ERISA cases. In *Bowerman*, 226 F.3d at 592 , the Seventh Circuit required an employer to pay as equitable relief within the meaning of Section 502(a)(3) health expenses that were not covered by insurance because of its fiduciary breach. However, the Court did not require that the plaintiff first show that the employer's breach resulted in unjust enrichment. Similarly, the Second Circuit in *Strom*, 202 F.3d at 144-45, awarded a beneficiary monetary relief under Section 502(a)(3) against a breaching fiduciary who had not been unjustly enriched. The Court explained that such a claim against a fiduciary has always stood within the exclusive province of equity and "never has required a showing of unjust enrichment." *See also Ream*, 107 F.3d 147; *McFadden v. R & R Engine & Mach. Co.*, 102 F. Supp. 2d 458 (N.D. Ohio 2000). None of these courts required plaintiffs to show unjust enrichment.

These judicial decisions, along with the *Restatement*, confirm that the fiduciary must do whatever is necessary to redress its breach, including paying losses to the beneficiary. *Supra*, Section A. (pp. 5-7); III. Scott *The Law of Trusts*, § 199.3, at 206. Regardless of how the courts label such a money payment—"monetary relief," "restitution" or even "damages"—the duty to make the payment arises in equity, not from unjust enrichment, but from the fiduciary relationship itself.[9]

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[9] Courts that have required unjust enrichment in Section 502(a)(3)

By contrast, claims for monetary awards against non-fiduciaries demand a showing of unjust enrichment in order to be considered equitable under Section 502(a)(3). *Great-West*, 534 U.S. at 213-14; *Harris Trust*, 530 U.S. at 251; *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 486 (6th Cir. 2001). Unjust enrichment is necessary to recover money from non-fiduciaries because the relief qualifies as "equitable" only if it constitutes "equitable restitution" (*i.e.*, if the circumstances warrant imposition of a constructive trust or equitable lien). Unjust enrichment must lay the foundation for ordering non-fiduciaries to pay monetary relief as restitution, because unlike fiduciaries, they have no independent duty in equity to redress a breach. Indeed the constructive trust remedy (recognized as equitable by the Supreme Court in *Great-West*), rests on the fiction that the person who possesses the property holds it in trust for the beneficiary. *Strom*, 202 F.3d at 144. There is no need for such a fiction to support equitable relief against an actual fiduciary.

CONCLUSION

Under the district court's interpretation of Section 502(a)(3), beneficiaries could be left without a remedy against fiduciaries who have committed serious violations of ERISA's provisions and directly injured the people they were charged to protect. Even a cursory review of the cases suggests the range of injuries that could go unredressed if the district court's view became law. *See, e.g., McFadden*, 102 F. Supp. 2d 458 (permitting cancer patient to recover his health expenses after he lost his health coverage because fiduciary-employer failed

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actions for money losses against breaching *fiduciaries* misinterpret background trust law as well as the import of the *Mertens* and *Great-West* decisions for all the reasons set forth in the text above. *See, e.g., Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999); *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003 (9th Cir. 1998), cert. denied, 528 U.S. 870 (1999). In addition, none of these courts had before it the argument made by the Secretary here.

to submit premiums to the insurance company); *Strom*, 202 F.3d at 144 (authorizing recovery of life insurance proceeds which were lost because of fiduciary's negligent handling of life insurance application); *Griggs v. E.I. DuPont De Nemours & Co.*, 237 F.3d 371, 385 (4th Cir. 2001) (remanding for determination of appropriate equitable relief where employer had informed participant that his lump sum early retirement payout would be tax deferred when it knew that it was not); *Shade v. Panhandle Motor Set-v. Corp.*, 91 F.3d 133, Unpublished Disposition, No. 95-1129, 1996 WL 386611, at *4 (4th Cir. July 11, 1996) (ordering employer whose misconduct excluded plaintiff from its health plan to pay for his $161,000 liver transplant).

This Court should not interpret ERISA's remedial provisions to permit fiduciaries to ignore their statutory obligations, injure beneficiaries, and evade liability. The award of make-whole monetary relief to beneficiaries who have been injured by fiduciary breaches is typically, historically, and exclusively equitable. This Court should therefore reverse and remand to the district court for further proceedings.

Respectfully submitted,

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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-4097

SANDY CALLERY,

Appellant,

v.

THE UNITED STATES LI.FE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,

Appellees.

Appeal from the United States District Court
District of Utah, Central Division

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLANT URGING REVERSAL

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STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit membership organization of more than 35 million persons age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. To foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health and other employee benefits.

AARP's members and other participants in employee benefit plans rely on the Employee Retirement Income Security Act (ERISA) to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* AARP has a strong interest in protecting older Americans from fiduciary misrepresentations, which will prevent them from attaining pension, health and other employee benefits.[1] It is crucial that employees must be able to recover to obtain appropriate equitable relief where fiduciaries did not provide timely and accurate information concerning the eligibility requirements for such benefits, but have taken actions which would lead reasonable persons to assume that they had met such requirements. The resolution of the issues herein will have a direct and vital bearing on these individuals' ability to obtain those benefits which will foster their economic secu-

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[1] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as amicus curiae, both jointly and singly, in numerous cases involving the scope of a fiduciary's duties as well as appropriate remedies under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Lindsay v. Thiokol Corp.*, 1 12 Fad 1068 (10th Cir. 1997).

rity. AARP, therefore, submits its brief *amicus curiae* to facilitate a full consideration by the court of these issues.

ARGUMENT

I. ERISA WAS ENACTED TO PROTECT EMPLOYEES, RETIREES AND BENEFICIARIES FROM A VARIETY OF ABUSES SURROUNDING THEIR EMPLOYEE BENEFITS AND TO ENSURE THAT THERE WAS A REMEDY FOR SUCH ABUSES.

In ERISA's statement of policy, Congress made it clear that the purpose of ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). Both the House Education and Labor and the Senate Labor and Public Welfare Committees elaborated on the aims of the statute's remedial provisions in virtually identical language:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

H.R. REP. No. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; S. REP. No. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871;[2] *see also Varity*

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[2] The use of these legislative reports was criticized in *Lafoy v. HMO Colorado*, 988 F.2d 97 (10th Cir. 1993). There, the court correctly stated that the provision allowing legal and equitable remedies appeared only in

Corp. v. Howe, 516 U.S. 489 (1996). Congress revealed its displeasure that the courts were "reluctant to apply concepts of equitable relief," indicating that the courts were not awarding the full panoply of available relief to make employees whole. S. REP. No. 93-127, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. "As part of [the] closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S. REP. No. 93-127, at 36 (1973)). These statements "support the view that the creation of an adequate and, indeed, improved remedial scheme for the benefit of participants and beneficiaries was an important goal." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 145 (2d Cit. 1999).

II. BECAUSE TRUST LAW PROVIDES THAT A FIDUCIARY MAY BE COMPELLED TO REDRESS ANY BREACH OF TRUST, MS. CALLERY'S BREACH OF FIDUCIARY DUTY CLAIM AND ANY ENSUING REMEDY ARE ALWAYS EQUITABLE.

ERISA imposes upon fiduciaries of employee benefit plans the duties to act prudently and with loyalty toward participants in those plans. ERISA § 404(a)(1)(B); 29 U.S.C. § 1104(a)(1)(B). When fiduciaries breach these duties, ERISA § 502(a)(3) permits plan participants to sue the

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early drafts of ERISA and was not in the final statute. However, the legislative history remained the same even after the statutory language changed. This legislative history deals generally with ERISA's enforcement provisions, some of which do provide for legal relief. The inference to be drawn from this legislative history is that Congress was indicating its intent that the enforcement provisions be interpreted broadly, instead of narrowly, to give full force and effect to its stated purposes. ERISA § (2)(b), 29 U.S.C. § 1001(b).

fiduciary to redress any such breach. 29 U.S.C. § 1132(a)(3); *see also Varity*, 516 U.S. at 492. Section 502(a)(3) limits relief for violations of that section to "appropriate equitable relief." The Supreme Court has clarified that section 502(a)(3) excludes "legal" relief, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993), and has directed participants seeking equitable relief to refer to "those categories of relief that were typically available in equity . . . ." *Id.* at 256; accord, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002); *see generally Bowen v. Massachusetts*, 487 U.S. 879, 893, 914 (1988) (illustrating that Justice Stevens, for the majority, and Justice Scalia, in the dissent, both agreed with the distinction between action at law for damages and equitable action for specific relief).[3]

To determine what relief is typical equitable relief, the Court instructs us that "standard current works such as Dobbs, Palmer, Corbin, and the Restatements" should easily provide the answers. *Great-West*, 534 U.S. at 217. Our analysis therefore reviews these works to demonstrate that the district judge's order to dismiss Ms. Callery's claim misconstrues *Mertens* and *Great-West*.

The common law of trusts is the starting point for analysis of breach of fiduciary duty claims, unless trust law is inconsistent with ERISA's language, structure, or purpose. *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000); accord, *Firestone Tire &*

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[3] "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (providing for the restoration of lost wages in a Fair Labor Standards Act case). Indeed, absent a clear command by Congress that a statute providing equitable relief excludes certain forms of relief, a court should presume that it has the discretion to exercise the full scope of equitable powers. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law"); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) ("Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty.").

The Restatement of Trusts underscores that "the remedies of the beneficiary against the trustee are exclusively equitable." RESTATEMENT (SECOND) OF TRUSTS § 197, at 433 (1959) (emphasis added); see also *id.* § 199, at 437 (setting forth "equitable remedies of beneficiary"). As Professor Bogert explains:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties.
>
> The court is not confined to a limited list of remedies but rather will modify the relief to protect the rights of the beneficiary according to the situation involved. If equity cannot give the beneficiary the exact benefit to which the trust would entitle him, it will provide him with the best possible substitute.

George G. Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 861, at 3-4 (Rev. 2d ed. 1995) (hereinafter "BOGERT") (emphasis added); *see also* A. Scott & W. Fratcher, THE LAW OF TRUSTS § 199.3, at 203-04, 206 (4th ed. 1988) (hereinafter "SCOTT & FRATCHER")(listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). Indeed, not only does the Restatement of Trusts specifically provide that a beneficiary can maintain a suit to compel

the trustee to perform his duties, but it also provides that suit may be brought to compel the trustee to redress any breach of trust. Such suits and the ensuing remedies are *always* equitable. RESTATEMENT (SECOND) OF TRUSTS §§ 197, 199 (a) & (c)); accord, SCOTT & FRATCHER, §§ 201 & 205, at 219, 237 (where the trustee commits a breach of trust, the beneficiary can charge the trustee with any loss that resulted from the breach of trust); BOGERT, § 862, at 34 (trustee may be directed by the court to pay damages to the beneficiary out of the trustee's own funds"). Because the fiduciary-beneficiary relationship arises in equity, it creates equitable rights and duties. When those duties are breached, all remedies ordered by the court are considered equitable remedies. Id. Whether or not such a remedy includes a monetary award does not change its character as an equitable remedy.

Great-West and *Mertens* do not counsel otherwise. *Mertens* did not hold that monetary relief granted by a court of equity was never equitable. Instead, *Mertens* stressed that the inherent nature of the relief sought is dispositive. Thus, the plaintiff must produce an independent basis establishing the equitable character of his relief. Here, the monetary relief sought by Ms. Callery from the fiduciary defendant is intrinsically equitable. It is equitable because any relief in favor of a beneficiary against a fiduciary to remedy that fiduciary's own breach is and always has been equitable relief under the common law of trusts, whether or not it includes monetary relief, and whether or not a common law court of equity would have granted it. Clearly, the monetary relief Ms. Callery seeks from the defendant fiduciary nestles comfortably within the bounds of ERISA's concept of "equitable relief' as established by the common law of trusts. *See* RESTATEMENT §§ 197, 199(a) & (c); accord, SCOTT & FRATCHER, §§ 201 & 205, at 219, 237; cf. *Berger v. Xerox Corp. Retirement Income Guar. Plan*, 2003 U.S. App. LEXIS 15427 (7th Cir. August 1, 2003)(No. 02-3674) (Posner, J.)

(". . . ERISA fiduciaries may sue under ERISA only for equitable relief.").

Moreover, *Mertens* distinguished between fiduciaries and non-fiduciaries, stating that although under the common law of trusts damages could be obtained from third-party non-fiduciaries for knowing participation in the trustee's breach of fiduciary duty, "only the trustee had fiduciary duties." *Mertens*, 508 U.S. at 262. The Court belittled the argument that its refusal to allow monetary damages for a non-fiduciary's knowing participation narrows the scope of protection under ERISA. The Court stated that because ERISA uses a functional definition of fiduciary, more entities are covered under ERISA as fiduciaries than under the common law of trusts. *Id.* Thus, consistent with courts of equity, more remedies are available against fiduciaries than against non-fiduciaries. *Id.*; cf Berger, *supra* at 8. This conclusion is consistent with the Court's allocation of liability between fiduciaries and non-fiduciaries based on the amount of control they have over the plan. *Id.* (ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds."); accord, *Harris Trust*, 530 U.S. at 251 (ERISA may place greater limitations on remedies against parties "other than the principal wrongdoer," e.g., the breaching fiduciary, including a showing that the non-fiduciary had been unjustly enriched with trust assets).

Great-West merely emphasized the Court's position in *Mertens*, holding again that a contractual claim against a non-fiduciary is a request for legal damages. 534 U.S. at 210. Quoting then-Chief Judge Posner, the Court emphasized that whether a remedy was equitable depends on the basis for the claim and "the nature of the underlying remedies sought." *Id.* at 213 (quoting Reich v. Continental Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994)).

Here, unlike *Great-West*, there is no contractual obligation at issue. Neither *Mertens* nor *Great-West* involved a bene-

ficiary suing a fiduciary for a breach of its duty, as is the claim here. Rather, a party other than the fiduciary was being sued. Standard works such as the Restatement, Scott & Fratcher and Bogert cited herein make it clear that the action of a beneficiary suing for a fiduciary's breach is an equitable action requesting relief that was typically available in equity. *Mertens*, 508 U.S. at 256; cf. *Berger*, *supra* at 8.

Moreover, this analysis reconciles the Supreme Court's decisions in *Mertens* and its subsequent decisions in *Varity* and *Great-West*. In citing ERISA § 2(b), the Court recognized ERISA's basic purposes as favoring a reading of § 502(a)(3) to provide participants with a remedy against fiduciaries. *Varity*, 516 U.S. at 513. The Court further stated that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm *individuals* by denying injured beneficiaries a remedy." *Id.* (emphasis added). The undisputed equitable relief the *Varity* participants were seeking, among other things, included reinstatement into the plan and monetary relief. *See Great-West*, 534 U.S. at 221, n. 5. In contrast, neither *Great-West* nor *Mertens* were suits by participants against fiduciaries. *See also Berger*, *supra*. at 8.

Other circuit courts have previously adopted this distinction of remedies available against fiduciaries and non-fiduciaries. In *Clair v. Harris Trust & Sav. Bank*, the Seventh Circuit recognized that monetary relief is equitable "when sought by person complaining of a breach of trust . . . . " 190 F.3d 495, 498 (7th Cir. 1999). Similarly, the Second Circuit in *Strom v. Goldman, Sachs & Co.* adopted this distinction between remedies for fiduciaries and non-fiduciaries.[4] 202 F.3d at 148. Like this case, the plan beneficiary sued the

[4] Although defendant cites district court cases from the Second Circuit, Strom is still good law and has not been overruled. *See Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-22 (2d Cir. 2003) (noting the distinction between the remedies available against fiduciaries and non-fiduciaries).

employer under § 502(a)(3) due to the employer's breach of fiduciary duty by negligently handling an employee's life insurance application, seeking the amount of insurance proceeds she would have received had the employer properly handled the application. The Second Circuit upheld the money relief requested as "equitable" relief explaining that beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." *Strom*, 202 F.3d at 144; *see also Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000) (requiring fiduciary, under Section 502(a)(3), to compensate beneficiary for unpaid medical expenses resulting from its breach); *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997); *Shade v. Panhandle Motor Serv. Corp.*, 1996 U.S. App. LEXIS 16703, at *1 (4th Cir. 1996) (No. 95-1129) (unpublished decision)[5]

The Restatement of Trusts clearly supports these cases by permitting monetary relief against a fiduciary for a breach of trust generally and a breach of the duty of loyalty.[6] *See*

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[5] In *Ream*, the trustee conveyed pension plan assets to the plan administrator who then absconded. The court ordered the trustee to pay the beneficiary the amount of his vested interest in the plan, characterizing its order as equitable restitution under Section 502(a)(3). 107 F.3d at 153. Similarly, in *Shade*, the employer's misconduct excluded the plaintiff from its health plan.

As a result, he had no medical benefits to pay for his $161,000 liver transplant. Although the court did not expressly address the "equitable" character of this monetary relief, it still awarded it as appropriate "to restore [plaintiff] to the position he would have occupied but for [the employer's] breach of its fiduciary duty." *Shade*, 1996 U.S. App. LEXIS 16703, at *10.

[6] In *Schleibaum v. Kmart Corp.*, a life insurance case, the Seventh Circuit stated that the cost of covering the insurance benefit, that is the premium, was not the appropriate remedy. 153 F.3d 496 (7th Cir. 1998). The court intimated that an equitable remedy would be the "face value of his [life insurance] policy." *Id.* at 504. Like Ms. Callery who could have secured a different life insurance policy if she had known of the divorce

RESTATEMENT §§ 205 & 206, cmts. and illus; *see* SCOTT & FRATCHER § 199.1, at 206 (if the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel the trustee to redress the breach of trust by any means including the payment of money). A fiduciary can be ordered to restore the beneficiary to the position he or she would have been but for the breach of trust. "If the [fiduciary's] breach of trust causes a loss, the beneficiaries may surcharge the [fiduciary] for the amount necessary to compensate fully for the consequences of the breach." See RESTATEMENT § 205, cmt. a. Because Ms. Callery's claim arises from a breach of the fiduciary-beneficiary relationship, the basis of the claim is equitable and any remedy granted is considered equitable. *Great-West*, 534 U.S. at 213.

CONCLUSION

For the reasons stated above, AARP respectfully urges this Court to reverse the judgment of the district court and remand for proceedings consistent with this proceeding.

Respectfully submitted,

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exclusion but for Star Buffet's failure to provide accurate and timely information, the court found it important that "Kmart did not impart this critical information [on appeal rights] to the claimant at a time when he could have still done something about it." *Id.* at 499.